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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 150

A. M. GILSTRAP, ET AL.,
Petitioners,
vs.
STANDARD OIL COMPANY, an Ohio corporation, et al.

No. 151

A. M. GILSTRAP,
Petitioner,
vs.
STANDARD OIL COMPANY, an Ohio corporation, et al.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF DEFENDANTS EARL WARREN, JOE BRANDON, M. B. DRIVER, GEORGE C. PERKINS, ROBT. P. TRACY, SAMUEL BERRY, L. E. VAN PATTEN, HUGO RADBRUCH, AND MARK W. GARBINI, IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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PRELIMINARY STATEMENT.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, disposing of both these cases, is reported in 108 F. (2nd) 736. No opinion was written in the District Court, but the rulings on the several motions and the remarks of the District Judge thereupon appear in the record (No. 150, 131-4 and 283-6; No. 151, 377-387).

STATEMENT OF THE CASE.

Petitioners commenced these actions in the United States District Court for the Southern District of California. Of the defendants filing this brief, Earl Warren, Joe Brandon, M. B. Driver, George C. Perkins and Robt. P. Tracy were named defendants in a first amended complaint in No. 150 (R. 3); and in No. 151 the same defendants, together with the balance of those here appearing, viz. Samuel Berry, L. E. Van Patten, Hugo Radbruch and Mark W. Garbini, were named defendants in a first amended complaint (R. 81). Several oil companies and other individuals were joined as defendants in each case, and in No. 151, the so-called "libel case," three newspaper companies were likewise joined.

Exception was taken on the part of these defendants to the jurisdiction of the District Court.[1] Affidavits were filed in support of their several motions, alleging the residence and citizenship of each of the defendants so appearing to be in the County of Alameda, State of California, and outside the District wherein the suit was brought. The affidavits so filed further show that each of these nine defendants were at the times referred to in petitioners' pleadings public officers of either the City of Oakland or the County of Alameda engaged in law

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[1]In No. 150, motion to dismiss of Brandon, Driver, Perkins and Tracy (R. 115), and demurrer under the former practice (R. 105); motion to dismiss of Warren (R. 320). Affidavits of each defendant in support of the motion (R. 117-123, 323).

In No. 151, motion to dismiss of Warren, Brandon, Driver, Tracy, Berry, Perkins, and Radbruch (R. 188-195). Motion to dismiss of Van Patten and Garbini (R. 269-277). Affidavits in support of these motions (R. 191, 273 and 275).

enforcement work.[2] In No. 151 the affidavits further state that as to each of these nine defendants that the only connection they ever had with petitioner Gilstrap was upon official business in connection with a criminal prosecution of said petitioners in Alameda County in 1932-1933.[3]

The grounds upon which dismissal was requested in the District Court were stated in the several motions (No. 150, R. 115 and 320; No. 151, R. 188 and 269), and are based upon lack of diversity of citizenship and failure to show the existence of a controversy arising under the Constitution or laws of the United States.

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[2]The data given in these affidavits is as follows:

NAME	OFFICIAL CAPACITY	PERIOD OF SERVICE
Earl Warren,	District Attorney, Alameda County,	January, 1925-January, 1939.
Joe Brandon,	Deputy Sheriff, Alameda County, and Inspector in office of District Attorney,	June, 1932-May, 1935.
M. B. Driver,	Sheriff, Alameda County,	Approximately 8 years last past.
Robt. P. Tracy,	Police Officer, City of Oakland,	More than 22 years last past.
Samuel Berry,	Deputy District Attorney, Alameda County,	Approximately April, 1931-August, 1933.
Hugo Radbruch,	Deputy Sheriff, Alameda County,	Approximately 11 years last past.
George C. Perkins,	Deputy District Attorney, Alameda County,	More than 10 years last past.
L. E. Van Patten,	Deputy Sheriff, Alameda County,	More than 12 years last past.
Mark W. Garbini,	Constable and ex-officio Deputy Sheriff, Alameda County,	More than 8 years last past.

[3]No. 151, R. 191, 194-5, 273-7.

The District Court granted the motions in each instance (No. 150, R. 131, 134; No. 151, R. 371, 375-6). In No. 150, demurrers were likewise sustained without leave to amend as to these defendants (R. 134). Thereafter a second amended complaint (R. 135) was filed in No. 150 omitting these defendants in conformity with the order, and none of the defendants here appearing were ever served therewith or thereafter appeared in No. 150. In No. 151, the motions to dismiss were granted without leave to amend (R. 375-6).

ARGUMENT.

Case No. 150.

Either diversity of citizenship or a cause of action arising under the Constitution or laws of the United States must be found to support the jurisdiction of the District Court in these cases,[4] else no jurisdiction existed and the District Court was correct in dismissing and the Circuit Court of Appeals was correct in affirming the dismissal.[5]

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[4]Original jurisdiction of District Courts is governed by Sec. 24 of the Judicial Code (Title 28 U. S. C. A. Sec. 41), the pertinent portion of which reads:

> "First. Of all suits of a civil nature, at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution of laws of the United States, . . . or (b) is between citizens of different states, . . ."

[5]Sec. 37 of the Judicial Code (Title 28 U. S. C. A. Sec. 80) requires dismissal where lack of jurisdiction appears. It is there provided:

> "If in any suit commenced in a district court, . . . it shall appear to the satisfaction of the district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or . . ., the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

The record in each case affirmatively establishes lack of diversity of citizenship. The first amended complaint in each case established that each plaintiff was a resident and citizen of California (No. 150, R. 4; No. 151, R. 82). Each of the individual defendants likewise were citizens and residents of California (No. 150, R. 117-123, 323; No. 151, R. 191-194 and 273-277). It is elementary that for jurisdictional purposes the controversy is not between citizens of different states unless all the persons on one side are citizens of different states from all those on the other side.

Salem Trust Co. vs. *Manufacturers Finance Co.*, 264 U. S. 182, 189.

Ayres v. *Wiswall*, 112 U. S. 187, 192.

Gilbert vs. *David*, 235 U. S. 561, 567.

Perez v. *Canadian Land & Fur Co.*, 14 Fed. (2nd) 181, 183.

In No. 150 damages are claimed to have been suffered by plaintiffs as the result of the loss of certain leaseholds and the anticipated profits therefrom as the result of an asserted conspiracy on behalf of the corporate and the individual defendants. Plaintiffs claim they were deprived of their leasehold interests by the fraudulent abandoning of drilling operations on the part of certain of the defendants other than those in whose behalf this brief is written. All this occurred prior to November, 1930, that being the time plaintiff A. M. Gilstrap filed an action in the state court for the asserted fraud (No. 150, R. 8-9). It appears that no petroleum, natural gas or other hydro-carbon substance was ever produced from the lands in question (R. 37-41). That is to say, there was never any existing business which was destroyed, the

most that is claimed by plaintiffs being that a potential business was prevented from being developed.

The acts attributed to these particular defendants relate to their prosecution of plaintiff A. M. Gilstrap, which resulted in his conviction in a state court and his consequent incarceration in state's prison. All of this occurred in the latter part of 1932 and the early part of 1933 (R. 15-23). This was long after plaintiffs had lost their leases, which occurred some time prior to November, 1930.

Whatever injury plaintiffs may have suffered was complete long prior to the prosecution and conviction of A. M. Gilstrap. If they lost their properties as a result of a conspiracy they were lost long before the time any of these named defendants are charged with participation therein.

The gist of the action is not the conspiracy, for a conspiracy of itself is not civilly actionable; the right of recovery is based upon injuries that result therefrom, and no cause of action arises unless and until damages are sustained.

Nalle v. *Oyster*, 230 U. S. 165, 182.
Dowdell v. *Carpy*, 129 Cal. 168, 61 Pac. 948.

If the pleading in the case can be construed as alleging malicious prosecution or false arrest against these defendants the District Court would be without jurisdiction thereof. Furthermore, an action for malicious prosecution could not be sustained because of the absence of the vital factor of a conclusion of the prosecution favorable to the person prosecuted.

Crescent Live Stock Co. vs. *Butchers' Union*, 120 U. S. 141, 147-8.

Roos vs. *Harris*, 203 Cal. 201, 263 Pac. 225.

A public officer is not liable civilly for any action done by him in an official judicial or quasi judicial capacity.

Bradley vs. *Fisher*, 80 U. S. 335, 337.

Spaulding vs. *Vilas*, 161 U. S. 483, 498.

Cooper vs. *O'Connor*, (1938 App. D. C.) 99 Fed. (2nd) 135.

Pearson vs. *Reed*, 6 Cal. App. (2nd) 277, 44 Pac. (2nd) 592.

White vs. *Brinkman*, 23 Cal. App. (2nd) 307, 73 Pac. (2nd) 254.

Case No. 151.

Most of the foregoing is also applicable to the pleading in No. 151, which is denominated "Libel" (R. 81), and which recounts a good many of the same events referred to in No. 150. Damages in No. 151 are demanded apparently upon the theory that all defendants conspired together to publish false and malicious statements in newspapers and before a court and jury of and concerning plaintiff, whereby plaintiff was accused and convicted of crime, lost his credit with merchants, lost his leasehold interests in prospective oil lands, was prevented from making profits from the latter and was deprived of many records, papers and personal effects relating thereto.

The pleading fails to disclose any basis for Federal jurisdiction over the acts of state officers in prosecuting

and securing the conviction of plaintiff. It would seem that the judgment of conviction would constitute a complete answer to the charge of false accusations.

Nalle vs. *Oyster*, 230 U. S. 165, 182.

As stated by the District Judge in dismissing the action (R. 79):

> "There is nothing in the fifty volumes of the United States Code Annotated which gives the court original jurisdiction of an action for libel against a citizen of a state. Actions for libel may therefore be brought in a United States Court upon the other ground only, namely, that diversity of citizenship exists."

It is respectfully submitted that the petition for certiorari in each case should be denied.

Dated: September 4, 1940.

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